

The Last Chance Saloon

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It should be uncontentious that a rule of law crisis exists in Hungary. Indeed, one might go as far as to suggest that in continuing to describe current conditions as a 'rule of law crisis', commentators have acquired a rather British taste for understatement. What persists in Hungary is a democratic crisis. If there was any doubt, it became incontestable following the passage of the Enabling Act on the 30th March. The consequences of that Act were explained in detail by [Kovács](#); suffice it to say, the Act allows the Prime Minister to rule by decree, suspends all elections and referendums during the period of the declared emergency, and provides that it is the Prime Minister who determines when that emergency ends. To all intents and purposes, Orbán and his government have ceased to be democratically accountable either to the Hungarian Parliament or to the citizens of Hungary. I choose the words in that last sentence carefully, and the reason for this will become apparent below. In this blogpost, I suggest that Article 10 TEU may provide a basis for the exclusion of Hungarian representatives from the European Council and the Council of the European Union (henceforth "Council").

What to do about Hungary's democratic crisis?

What should or can be done about Hungary's serious and persistent breaches of the EU's core Article 2 TEU values has been a major problem for some years now. The weaknesses of the arsenal provided by the EU Treaties to respond to a Member State's flagrant disregard of these values have been exposed: enforcement of EU law and CJEU judgments ultimately relies upon the sincere cooperation of the Member State, and the Article 7 TEU process is frustrated by the requirement of unanimity to suspend voting rights. Additionally, responses have been hampered by the reticence shown by political actors, especially the EPP, to confront Hungary directly. Given the depth of the crisis in Hungary and the seriousness of the threat it poses to the EU democratic and legal orders, imaginative solutions are required.

In a recent blog post, [Hillion](#) proffered the intriguing argument that Poland and Hungary's ongoing violation of the prerequisites of EU membership could amount to a triggering of the Article 50 TEU process by those States, i.e. a notification of a decision to withdraw from the EU. Hillion's argument drew a number of retorts. [I argued](#) that Hillion's argument was doctrinally unsound and that it would have a chaotic and counterproductive outcome. [Scholtes](#) maintained that Hillion's argument amounted to 'legal fetishism' and that the awkward truth is that a solution to the Polish and Hungarian questions could not be found through legal sleights-of-hand.

Although I continue to agree with Scholtes, I maintain that while legal mechanisms may not provide an answer by themselves, political actors or concerned individuals exhibiting sufficient resolve could, with assistance from the CJEU, utilise legal arguments to assert significant pressure on recalcitrant Member States such as

Hungary. In this spirit, I make the tentative argument that Article 10(1) and (2) TEU can be interpreted as excluding Hungarian representatives from the European Council and the Council.

Article 10(1) and (2) TEU and excluding Hungarian Representatives from the European Council and the Council

Article 10(1) TEU provides: “The functioning of the Union shall be founded on *representative democracy*.” (emphasis added). In addition, the second subparagraph of Article 10(2) TEU provides: “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, *themselves democratically accountable either to their national Parliaments, or to their citizens*.” (emphasis added).

If one focusses on Article 10(2) TEU specifically, there are, of course, a number of possible interpretations, especially when it is read together with other TEU provisions. However, I would tentatively suggest the following understanding: in order to represent a Member State in the European Council or the Council, a head of state or government, in the case of the former, or a government, in the case of the latter, must be “democratically accountable either to their national Parliaments, or to their citizens.” In my view, this is a perfectly plausible and quite literal interpretation of the provision. The logical consequence of such a reading is that the Hungarian government is currently not entitled to partake in the work of the European Council or Council. This is because Orbán’s government is currently unaccountable to the Hungarian Parliament and Hungarian citizens, since Orbán rules by decree and has suspended elections and referendums, possibly indefinitely. Furthermore, it is arguable that any reviewable act concluded by a European Council or Council formation containing Hungarian representatives while they are not entitled to partake in those institutions is unlawful.

Responding to possible doctrinal objections to my argument

Against the interpretation I offer above, it could be argued that the wording of the TEU provisions relating to the composition of the European Council and Council requires both institutions to consist of representatives of all Member States. Article 16(2) TEU, which relates to the Council, seems quite explicit in this regard: “The Council shall consist of a representative of each Member State at ministerial level.” In reply, it might be argued that this provision does not contradict Article 10(2) TEU, which merely requires that these representatives be “democratically accountable” in order to take their place in the Council.

Furthermore, one might argue that the procedure established in Article 7 TEU is designed specifically to deal with Member State breaches of the core values of the EU (including respect for democracy), and that this provision is *lex specialis*.

This is certainly a strong argument. However, I would counter that Article 7 TEU is designed for responses to breaches or dilutions of the democratic value; Article 10(2) TEU suggests that when a Member State becomes completely authoritarian, as Hungary has, its government ceases to meet the basic qualification in that provision to partake in the European Council and Council.

It might also be argued *per contra* my assertion that the second subparagraph of is merely descriptive and that in the absence of the Article 7 process being completed, it should be assumed that all Member State governments are democratically accountable. I would counter this by pointing to the exclusive role of the CJEU under Article 19(1) TEU to “ensure in the interpretation and application of the Treaties the law is observed”; as such, it would be open to the CJEU, particularly in light of its Article 13(1) TEU duty to promote the values of the EU contained in Article 2 TEU, to interpret the second subparagraph of Article 10(2) TEU purposively as a minimum qualification requirement. Moreover, it would be within the jurisdiction of the CJEU to interpret the meaning of the words “democratically accountable” and to review whether a Member State government fulfilled this standard. As stated above, I do not believe that the Hungarian government fulfils this requirement at present.

Pragmatic problems with my argument

Although I maintain that my interpretation of Article 10 TEU is, at the very least, arguable, I can conceive of some pragmatic problems with my argument. A significant issue, in the absence of political will among EU institutions and Member State governments, would be engaging Article 10 TEU or litigating the question. There would appear to be no basis for an argument that the European Council or Council could take upon itself the decision to exclude government representatives from a Member State in which the “democratically accountable” condition was not fulfilled. For individuals litigating the matter (by contesting the legality of a reviewable act, by alleging it was taken by the European Council or Council with Hungarian government representation unlawfully partaking), the notoriously restrictive standing rules in Article 263 TFEU could present a hurdle. Direct action on the question might rely on the will of other Member States, the Commission or the European Parliament, with the latter perhaps being the most likely to demonstrate willingness to do so. An indirect challenge by an individual against an EU act in a national court, which could necessitate a preliminary reference might be the most likely avenue to the CJEU.

The pragmatic consequences of such a use of Article 10(2) TEU must also be considered. A successful argument that Hungarian representatives were not qualified to partake in European Council or Council proceedings would necessitate the CJEU having to make a difficult, though not impossible, assessment as to when precisely Hungary ceased to be entitled to representation. A desire to avoid wholesale nullification of acts taken by the European Council and Council would be a consideration. Moreover, the question of when the Hungarian government would once again be entitled to partake in European Council or Council proceedings would be a matter for ongoing judicial supervision, something that would not be ideal.

Possible Hungarian responses also have to be gamed into any potential use of Article 10(2) TEU. Orbán's government could regularly engage and disengage legislation like the Enabling Act, thereby creating continual confusion over Hungary's status in the European Council and Council, and by extension the legality of measures adopted by those institutions (a tactic that would require a response by the CJEU). Moreover, the Hungarian government could engage in a public relations war with the EU: elections or a referendum could be called in Hungary in an attempt to underscore the government's democratic accountability. Additionally, Hungarian representatives might attempt to publicly defy the CJEU by attempting to attend European Council or Council meetings, thereby possibly forcing security personnel to take (legally questionable) steps to exclude them. Finally, my suggested use of Article 10(2) TEU has a limitation in that it deals only with the current (and hopefully temporary) absence of democratic accountability by Parliament and citizens, rather than the wider problems of interference with independent courts.

Advantages of my argument

The problems described with my proposed interpretation and utilisation of Article 10(2) TEU in the preceding paragraphs are considerable. However, the proposal also has much to recommend it as a last resort. First, I would argue that it is a plausible argument doctrinally. Secondly, the exclusion of Hungarian government representatives from the European Council and Council does not force the EU into a potentially irreversible series of events. Additionally, it would be open to the CJEU in a judgment to place strict preconditions for Hungary's return to the European Council and Council, which could then be used as leverage to ensure Hungary, at least temporarily, takes measures to democratise. Thirdly, my suggestion does not (at least directly) punish the citizens of Hungary, who would maintain their representation in the European Parliament. Finally, with Hungarian representation excluded from proceedings in the European Council and Council, the likelihood of a successful Article 7 TEU process being concluded against Poland would be increased significantly. With Poland's voting rights suspended, attention could then turn to utilising Article 7 TEU against Hungary on its re-admission to the European Council and Council.

Conclusion

In closing, I would emphasise that I am making a tentative argument in this blogpost, and one that is certainly not without its problems. Nevertheless, the path I have suggested above could, in the absence of other means, provide an avenue through which pressure could be applied to the Hungarian government to end its state of emergency and reinstitute at least some measure of democratic accountability in the event that it were to drag its feet. It might also, as suggested above, allow Hungary and Poland to be isolated from one another and confronted separately via Article 7 TEU.